

APPEAL NO. 040980
FILED JUNE 4, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 31, 2004. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) is 25%. The appellant (self-insured) appealed, arguing that it was error to consider Texas Workers' Compensation Commission (Commission) Advisory 2003-10, dated July 22, 2003. The self-insured contends that the Commission engaged in ad hoc rulemaking and exceeded its authority set forth in the 1989 Act. The claimant responded, urging affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury on _____, and reached maximum medical improvement on August 7, 2002. The evidence reflects that the claimant underwent a multilevel fusion. The Commission-appointed designated doctor initially assigned the claimant a 10% IR and in response to a letter of clarification and referencing Commission Advisory 2003-10, the designated doctor amended his report and assigned the claimant a 25% IR, noting that the claimant had radiculopathy and loss of motion segment integrity. The designated doctor, in his report dated November 17, 2003, stated the claimant was placed in Diagnosis-Related Estimate (DRE) Lumbosacral Category IV and in a subsequent report acknowledged a typographical error was made and the claimant was actually placed in DRE Lumbosacral Category V.

Section 408.125(e) provides that, for a compensable injury that occurred prior to January 17, 2001, where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that the designated doctor's response to a request for clarification is also considered to have presumptive weight, as it is part of the designated doctor's opinion. See *also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. Whether the great weight of the other medical evidence was contrary to the opinion of the designated doctor was a factual question for the hearing officer to resolve. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we cannot agree that the hearing officer erred in granting presumptive weight to the amended report of the designated doctor.

In Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, we said that, for hearings held after July 22, 2003, involving IRs for spinal surgery that would be affected by Commission Advisory 2003-10, it is error not to consider and apply that advisory. Therefore, because the claimant in this case had a multilevel fusion, the hearing officer properly concluded that the designated doctor should consider and apply Commission Advisory 2003-10. We do note that in Texas Workers' Compensation Commission Appeal No. 032402-s, decided November 3, 2003, we said that although Commission Advisory 2003-10 provides for placement in DRE Category IV for loss of motion segment integrity based on the existence of a multilevel fusion, the AMA Guides instruct that the condition provided for in DRE Category IV, coupled with radiculopathy, would warrant placement in DRE Category V. This may also be considered by the hearing officer and the designated doctor.

The carrier contends that in issuing Advisory 2003-10, the Commission engaged in ad hoc rulemaking, and as such, the hearing officer's reliance on the advisory is tantamount to applying the "wrong legal standard." Whether the Commission exceeded its authority in issuing Advisory 2003-10 is a matter for the courts. See Texas Workers' Compensation Commission Appeal No. 031441, decided July 23, 2003.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**GT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Margaret L. Turner
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Edward Vilano
Appeals Judge